

# Equitable Mortgages And The Consent Provisions Of The Land Use Act

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EQUITABLE MORTGAGES AND THE CONSENT PROVISIONS  
OF THE LAND USE ACT: A REVIEW OF THE DECISION IN  
OKUNEYE V. FIRST BANK OF NIGERIA PLC AND ITS IMPLICATIONS.

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The rule that creation of all mortgages requires Governor's consent in accordance with the relevant provisions of the Land Use Act is now at best, a general one consequent upon the recent decision of the Court of Appeal in Okuneye V. First Bank of Nigeria Plc.<sup>2</sup> Seven years after the Supreme Court decision in Savannah Bank of Nigeria Ltd V. Ajilo<sup>3</sup> that a mortgage of a Right of Occupancy without the requisite consent of the Governor first had and obtained was null and void and consequently unenforceable, the Court of Appeal held that an equitable mortgage in the form of deposit of title deeds did not require Governor's consent. In reaching that decision, the Court examined both the nature of the transaction involved vis a-vis the word 'alienate' as used in the Land Use Act, and interpreted the word 'mortgage' accordingly.

The Facts

The facts in Okuneye V. First Bank of Nigeria Ltd were that the Plaintiff/Respondent gave overdraft facility to a construction company of which the Defendant/Appellant was the Director. The Director guaranteed the overdraft facility and deposited the title deeds of his real property at Ketu Lagos State as security with the Plaintiff/Respondent. Upon default in repaying the loan, the Plaintiff/Respondent brought an action against the company and judgement was entered in their favour. The defendant's chattels were attached and sold in execution of judgement but the moneys realized was inadequate to liquidate the loan. The plaintiff then sought court order to sell the defendant's property covered by the title deeds deposited with the Plaintiff/Respondent by public auction. But the defendant relying on Savannah Bank of Nigeria Ltd V. Ajilo opposed the sale on the ground that the plaintiff did not obtain Governor's consent to the deposit of the title deeds of the property sought to be sold by virtue of section 22 of the Land Use Act, 1978.

The learned trial judge held that Governor's consent was required for a valid mortgage to be created. But still, the learned trial judge found merit in the defence and gave leave to the plaintiff to sell the property in question on the ground that the holder of a right of occupancy had the responsibility to seek and obtain Governor's consent; and if he failed to do so, he would not be allowed to profit by his own wrongdoing. In reaching that decision, the learned trial judge relied on two previous decisions; one of the Supreme Court<sup>4</sup> and another of the court of Appeal<sup>5</sup>

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2. Suit NO CA/1291/82; Judgment delivered on 3 July 1995 (Unreported).
3. (1990) 1 NWLR (pt 57) 305
4. Gmo Bank v. New Nigeria Bank Ltd (1980) 1 SC 77 at 79.
5. Awojobi v. National Bank of Nigeria Ltd (1987) 1 NWLR (pt 55)

On Appeal to the Court of Appeal, the main issue for determination<sup>6</sup> was whether the equitable mortgage created without Governor's consent was enforceable in view of sections 22 and 26 of the Land Use Act and the Supreme Court's decision in *Ajilo* case. The court found it unnecessary to examine the main reason behind the decision of the trial judge namely, the question whether the Defendant/Appellant could be allowed to benefit from his own wrongdoing. The issue was neither canvassed as a ground of Appeal nor targeted to the determination of the main issue of consent as addressed in the case<sup>7</sup>. Upholding the order of the High Court granting leave to the Plaintiff to enforce the equitable mortgage but on a different ground, the court held that the consent provisions of the Land Use Act namely, section 22 and 26 contemplated alienation of legal title or possession of real property from one person to another and that the deposit of title deeds did not amount to such alienation. The court distinguished the Supreme Court decision in *Ajilo* case on the ground that the transaction in that case was a legal mortgage which involved a transfer of legal title from the mortgagor to the mortgagee whereas, the deposit of title deeds in the case under review amounted to an equitable mortgage which transaction did not involve any form of transfer.

#### Basis for the decision

The court of Appeal's decision hinged on the interpretation of section 22 of the Land Use Act particularly, the words 'alienate' and 'mortgage' respectively, section 22 provides:

"It shall not be lawful for a holder of a statutory right of occupancy granted by the Military Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Military Governor first had obtained" (Emphasis mine).

The interpretation of the above provision as contained in the Supreme Court decision in *Ajilo* case is that a mortgage purportedly created without Governor's consent shall be unenforceable by the mortgagee upon default by the mortgagor in repaying the loan and any transaction or any instrument purporting to create the mortgage shall be void by virtue of section 26 of the Act. But the court of Appeal in construing the provision vis a vis the equitable mortgage created by way of deposit of title deeds interpreted the word 'alienate' to mean 'convey' or 'transfer' of title to property and the word 'mortgage' as a transaction affecting legal title to property. Consequently since "a legal mortgage transfers title in the property to the mortgagee" and "an equitable mortgage by way of deposit of title deeds does not" the requirement of Governor's consent applies to the former mainly and exclusively. It was on that ground that the Court of Appeal distinguished *Ajilo* case and held the principle therein inapplicable to the case under review. For the avoidance of doubt, the court construed the phrase "otherwise

6. The issues were broken down into two for ease of argument.
7. It couldn't have been necessary for the court to determine the issue having decided that the transaction did not require Governor's Consent.

however" after the word "sublease" in the provision, under the ejusdem generis rule and confined same "to any of the means by which legal title or possession of real property can be transferred from the one person to another".

#### Pitfall in the Court of Appeal's Pronouncement.

The Court of Appeal's presumption that alienation by way of a mortgage connotes a transfer of legal title from one person to another is unnecessarily restrictive. With due respect, neither the word 'alienate' nor the word 'mortgage' is amenable to such a restrictive interpretation. The Black's Law Dictionary relied upon by the Court of Appeal defines the word 'alienate' as: "The transfer of the property and possession of lands, tenements, or other things, from one person to another" (Emphasis mine)

It expatiates further that:

"The term is particularly applied to absolute conveyances of real property. The voluntary and complete transfer from one person to another" (Emphasis mine)

The first leg of the above definition is concerned with the general form of transfer of proprietary or possessory interest from one person to another while the second leg refers to the special usage of the word 'alienate' in relation to absolute conveyance of real property i.e a sale or more appropriately, a complete assignment of a right of occupancy under the Land Use Act.

In relation to mortgages, the word alienate can only be interpreted as the "transfer of property and [or] possession of lands..... from one person to another" as opposed to an "absolute conveyance of real property" since the latter is the direct antithesis of a mortgage and refers to a complete assignment otherwise known as a sale. The word 'and' in the definition has to be construed disjunctively since transfer of possession is not a prerequisite for creating the English mortgage<sup>8</sup>. A mortgage of real property no doubt, is a transfer or conveyance of proprietary interest in land from one person to another. Although such interest may be legal such as the situation in *Ajilo* case where the deed of mortgage purported to transfer the legal title in the property to the defendant, it may also be equitable such as where a subsequent mortgage is created after a preceding legal mortgage in states outside Oyo, Ogun, Ondo, Osun, Ekiti, Edo and Delta States of Nigeria. A subsequent mortgage created after a legal mortgage in states outside those mentioned usually involves the conveyance of the mortgagor's equity of redemption to the mortgagee<sup>9</sup>. The equity of redemption is a proprietary interest which the mortgagor is entitled in law to deal with by assignment, mortgage or by way of testamentary

8. See *Re Morit* (1886)18QB p.222 at 232, 234.

9. This is the case whether or not the mortgage agreement describes the transaction as a legal or an equitable mortgage.



disposition<sup>10</sup>. An equitable mortgage of this nature is usually created by way of alienation i.e. by transfer of proprietary interest from the mortgagor to the mortgagee.

Thus, the Court of Appeal's pronouncement that the method specifically mentioned including mortgage, "affect the legal title of the land itself or of the possession thereof" is against legal principles and contrary to the intentment of the Land Use Act under section 22. That an equitable mortgage which involves a transfer of equitable title from the mortgagor to the mortgagee requires Governor's consent may be construed from proviso (a) to section 22 which provides:

"Provided that the consent of the Governor-  
(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor".

It may be construed from the above provision not only that "mortgage" as used in the Act includes equitable mortgage but also that Governor's consent is required for its creation. Also, when the main provision of section 22 is read together with proviso (a), it is clear that not all equitable mortgages require Governor's consent but that which involves alienation of proprietary interest from the mortgagor to the mortgagee. Other forms of equitable mortgage such as deposit of title deeds or agreement creating a charge which do not involve any form of alienation of proprietary right in land, are excluded by implication, in the case under review, the Court of Appeal merely recognized the species of equitable mortgage ranking as agreement to create legal mortgage<sup>11</sup> and, relying on the English case of Dennings v. Edwards<sup>12</sup> and the Supreme Court pronouncement in Awoygbagbe Light Industries Ltd v. Chinutwe<sup>13</sup> the court held that section 22 of the Land Use Act which prohibits alienation of a right of occupancy without Governor's consent first had and obtained did not prohibit agreement so to do as in the case of deposit of title deeds. The other category of equitable mortgage i.e. a transfer of equitable interest as security for credit facility cannot be within the purview of the Court of Appeal's decision. At best, the proposition of law that Governor's consent is not required for creating equitable mortgages can only apply to agreement to create legal mortgage which includes deposit of title deeds as security; it is no authority for that category of equitable mortgage involving a transfer of equitable interest from one person to another.

10. See Castro v. Scarfa (1737) A/K.603 at 605  
11. The categories of equitable mortgage enumerated in Ogundiani v. Araba (1978) 11 NSCC p.334 are not exhaustive as the Court of Appeal agreed  
12. (1961) AC p.245  
13. (1995) 4 NWLR (Pt.390) p.397 at p.426

### Implications of the decision

The implication of the Court of Appeal decision lies in the panacea afforded businessmen, investors and general creditors for the suffocating effect of the consent provisions on commercial transactions<sup>14</sup>. The lesson taught by the decision is that a quick transaction in secured credit provided by the enterprising investor is facilitated by side tracking the consent provision of the Land Use Act through the creation of an equitable mortgage by way of deposit of title deeds rather than a transfer of legal or equitable title as proprietary interest from the mortgagor to the mortgagee. A creditor on the other hand can have a fulfilling transaction and also ensure prompt realization of the security upon enforcement by ensuring preparation of memorandum of deposit under seal and thus enabling the mortgagee to exercise the power of a legal mortgagee to sell the security without recourse to court.

Where the Memorandum contains a power of Attorney or Trust declaration which empowers the mortgagee to sell the security and transfer title to the third party purchaser, the mortgagor's equity of redemption is destroyed by sale of the security consequent upon default by the mortgagor to repay the loan.

14. For the adverse effect of the consent provision in the Land Use Act, see Savannah Bank Ltd v. Ajlo (1999) NWLR P.305 at 329.